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(4)

No. 84-194

In the Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

WILLIAM T. CANNON
Robinson Building
Suite 1500
42 South 15th Street
Philadelphia, Pennsylvania 19102
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Counsel for Respondent

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Solicitor General
Department of Justice
Washington, D.C. 20530
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Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 2, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

19pp

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*Opinions and orders of the district court and the court of appeals (including the panel opinion and dissent, and the statements filed on denial of rehearing) are attached to the petition for certiorari.

DISTRICT COURT DOCKET ENTRIES

LOUISE SHEARER, IND., AND AS ADMINISTRAIX
THE ESTATE OF SHEARER, VERNON, DECEASED

v.

UNITED STATES OF AMERICAN
C/O PETER F. VAIRA
U.S. ATTORNEY

1982	
Jan. 7	Complaint filed.
Jan. 7	Summons exit (mailed to person)
Jan. 7	MOTION AND ORDER APPOINTING AARON SHEARER TO SERVE SUMMONS AND COMPLAINT UPON DEFT, FILED.
	1-8-82 Entered and Copies mailed.
Mar. 9	Appearance of Alexander Ewing, Jr., for United States of America, filed.
Mar. 17	Report of Pre-trial Conference, filed.
Mar. 30	Plff's First Set of Interrogatories, Certificate of Service, filed.
Apr. 2	Plff's First Request for Production of Documents from United States of America, Certificate of Service, filed.
Apr. 28	Deft's Answers to Plff's Interrogatories, filed.
Apr. 28	Deft's Response to Request for Production of Documents, filed.
Apr. 29	PLFF'S MOTION FOR ORDER UNDER RULE 37(a) AND (b) COMPELLING DEFT TO MAKE DISCOVERY AND IMPOSING SANCTIONS, NOTICE, MEMO, CERTIFICATE OF SERVICE, FILED.
May 3	PLFF'S MOTION FOR ADDITIONAL TIME IN WHICH TO FILE AMENDED COMPLAINT, NOTICE, CERTIFICATE OF SERVICE, FILED.
May 3	Deft's Answer to Plff's Motion to Compel Discovery, Memo, Certificate of Service, filed.

May 4 DEFT'S MOTION FOR SUMMARY JUDGMENT, NOTICE, MEMO CERTIFICATE OF SERVICE, FILED.

May 4 Deft's Answer, Certificate of Service, filed.

May 4 ISSUE JOINED.

May 4 Deft's Praecipe to file the attached Declaration as an attachment to Deft's Answers to Interrogatories which were filed with the Court on April 28, 1982, Declaration, Certificate of Service, filed.

May 4 PLFF's MOTION FOR ORDER COMPELLING DEFT. UNITED STATES OF AMERICA TO MAKE DISCOVER NOTICE, MEMO, CERTIFICATE OF SERVICE, FILED.

May 13 ORDER THAT PLFF'S MOTION TO COMPEL DISCOVERY ARE GRANTED IN PART, DENIED IN PART, ETC. PLFF'S MOTION FOR SANCTION IS DENIED, FURTHER ORDERED THAT PLFF IS TO FILE ITS ANSWER TO DEFT'S MOTION FOR SUMMARY JUDGMENT ON OR BEFORE MAY 21, 1982, ETC. FILED.

5/14/82 Entered and Copies mailed.

May 21 Plff's Answer to Deft's Motion for Summary Judgment, filed.

May 21 Plff's Memorandum of Law in Support of Plff's Answer to Deft's Motion for Summary Judgment, filed.

June 11 Deft's Reply Memorandum of Law in Support of Its Motion for Summary Judgment, Certificate of Service, filed.

Dec. 15 Withdrawal of Appearance of Alexander Ewing, Jr., AUSA, appearance of Margaret L. Hutchinson, AUSA, for deft., filed.

Dec. 21 Plff's memorandum response to deft's reply memorandum of law in support of its motion for summary judgment, filed.

Dec. 28 MEMORANDUM OAN ORDER THAT PLFF'S COMPLAINT IS DISMISSED AND JUDGMENT IS ENTERED IN FAVOR OF DEFT. AND AGAINST PLFF., FILED.

12/29/82 Entered & Copies mailed.

1983

Feb. 4 PLFF'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, STATEMENT IN SUPPORT, FILED.

Feb. 4 Plff's notice of appeal, filed. (83-1089)

2/7/83 Copies to: U.S.C.A., Margaret L. Hutchinson, Esq.

Feb. 4 Copy of Clerk's notice to U.S.C.A., filed.

Feb. 15 Affidavit of William T. Cannon, Esq. re: served plff's appeal to U.S. Court of Appeals on 2-10-83, filed.

Feb. 28 Gov't memorandum in opposition to motion to proceed in forma pauperis, cetificate filed.

Mar. 8 Transcript purchase order, filed.

Mar. 8 RECORD COMPLETE FOR PURPOSES OF APPEAL.

Mar. 10 ORDER DATED 3-8-83 THAT PLFF-APPELLANT'S MOTION TO PROCEED IN FORMA PAUPERIS IS GRANTED; MOTIONS TO EXCUSE THE FILING OF THE DISTRICT COURT RECORD & FOR REIMBURSEMENT FOR EXPENSES IN THE REPRODUCTION OF APPELLATE BRIEFS ARE DENIED, FILED.

3/11/83 Entered & Copies mailed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

82-0610
Civil Action File No. 82-0082

LOUISE SHEARER, IND. AND AS ADMINISTRATRIX
OF THE ESTATE OF VERNON SHEARER, DECEASED,
PLAINTIFF

v.

UNITED STATES OF AMERICA
C/O PETER F. VARIA
U.S. ATTORNEY, DEFENDANT

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon LOUISE SHEARER plaintiff's attorney, whose address 7811 Woolston Ave., Phila. Pa. 19150, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ _____
MICHAEL E. KUNZ
Clerk of Court

Date: JANUARY 7, 1982
NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, IND. AND AS
ADMINISTRATRIX OF THE ESTATE OF VERNON SHEARER,
DECEASED
7811 WOOLSTON AVENUE PHILADELPHIA, PA 19150

v.

UNITED STATES OF AMERICA
C/O PETER F. VAIRA
U.S. ATTORNEY
3310 U.S. COURT HOUSE
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC

COMPLAINT

1. This action is brought under the Federal Tort Claim Act 28 U.S.C. §1346(b) and §2671 et seq., as hereafter more fully appears.

2. Plaintiff is a citizen of the United States.

3. Plaintiff is the parent of Vernon Shearer, Deceased, and is the duly appointed Administratrix of the Estate of Vernon Shearer, Deceased, having been so appointed by the Orphans' Court of Philadelphia County, Pennsylvania. She brings this action on her own behalf and on behalf of all those entitled to share in the proceeds of any recovery arising from the death of Vernon Shearer, and is authorized to bring this action on their behalf.

4. A timely claim was filed with the Department of the Army which was denied by letter dated July 8, 1981.

5. On or about June 2, 1978, Vernon Shearer, in the vicinity of Ft. Bliss, Texas, was accosted by one Andrew Heard, a private in the United States Army, kidnapped and murdered, the kidnapping and murder taking place someplace within the confines of the Ft. Bliss Military Reservation or the adjacent Otero County, of New Mexico.

6. At the time of the kidnapping and murder, Andrew Heard had previously been known to have killed another individual, and had been convicted of that homicide, and was known by the United States Army to be dangerous and of a murderous disposition. Nevertheless he was permitted to remain at liberty and free of any restraints, supervision, constraints or control.

7. The United States Government, acting through its Department of the Army, and its duly authorized agents, servants and employees, negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other persons, in spite of the defendant's knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.

8. Solely as a result of the aforesaid, plaintiff brings this action under the Wrongful Death Acts of Pennsylvania and all other applicable jurisdictions, and under the Survivor Act of Pennsylvania, where Vernon Shearer was domiciled, and seeks such other damages as may legally be recovered as a result of or arising from the death of Vernon Shearer.

WHEREFORE, plaintiff demands judgment against the defendant in an amount in excess of Fifty Thousand ($50,000.00) Dollars plus costs.

/s/ _____

LOUISE SHEARER,
Individually and as Administratrix of the Estate of Vernon Shearer, deceased

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, IND. AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER

Defendant, United States of America, by its attorneys, Peter F. Vaira, United States Attorney in and for the Eastern District of Pennsylvania, and Alexander Ewing, Jr., Assistant United States Attorney in and for the same District, hereby responds to the numbered paragraphs of the Complaint as follows:

FIRST DEFENSE

1. & 2. Admitted.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3; hence they are deneid.

4. Admitted.

5. Admitted, with the proviso that the murder occurred in Otero County, New Mexico.

6. The allegations contained in the first sentence of paragraph 6 are admitted, except it is denied that the Army knew that Andrew Heard was "dangerous" or "of a murderous disposition." Defendant does not completely understand the allegations contained in the second sentence of paragraph 6; hence they are denied.

7. & 8. Denied.

SECOND DEFENSE

9. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

10. This Court lacks subject matter jurisdiction over this action.

FOURTH DEFENSE

11. Plaintiff's injuries, if any, were caused in whole or in part by plaintiff's own negligence.

FIFTH DEFENSE

12. Plaintiff voluntarily assumed the risk of any injuries plaintiff suffered.

SIXTH DEFENSE

13. Plaintiff's injuries, if any, were not caused by any negligent act or omission of any employee of defendant.

WHEREFORE, defendant requests the Court dismiss plaintiff's Complaint.

RESPECTFULLY SUBMITTED,
PETER F. VAIRA
United States Attorney

/s/ _____
ALEXANDER EWING, JR.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, IND., AND AS
ADMINISTRATRIX FOR THE ESTATE
OF VERNON SHEARER, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

PLAINTIFF'S PROPOSED AMENDED COMPLAINT

1. This action is brought under the Federal Tort Claims Act 28 U.S.C. Section 1346(b) and Section 2671 et seq., as hereafter more fully appears.

2. Plaintiff is a citizen of the United States.

3. Plaintiff is the parent of Vernon Shearer, Deceased, and is the duly appointed Administratrix of the Estate of Vernon Shearer, Deceased, having been so appointed by the Orphan's Court of Philadelphia County, Pennsylvania. She brings this action on her own behalf and on behalf of all those entitled to share in the proceeds of any recovery arising from the death of Vernon Shearer, and is authorized to bring this action on their behalf.

4. A timely claim was filed with the Department of the Army which was denied by letter dated July 8, 1981.

5. On or about January 22, 1979, Vernon Shearer, then 18 years of age, born June 3, 1960, enlisted in the United States Army.

6. At the time of his enlistment, Vernon Shearer, resided at 7811 Woolston Avenue, Philadelphia, Pennsylvania, with his parents, George and Louise Shearer.

7. By virtue of his enlistment, Vernon Shearer, S.S. #175-54-3309, was assigned pay grade E-1 earning a basic pay of $419.40 per month.

8. On or about February 2, 1979, Vernon Shearer was assigned to Basic Unit Training at Ft. Knox, Kentucky.

9. On or about May 5, 1979, Vernon Shearer was assigned to E Troop, 2d Battalion, 3rd Armored Cavalry Division, at Ft. Bliss, Texas.

10. On June 2, 1979, one day before his 19th birthday, Vernon Shearer was away from the military reservation of Ft. Bliss and off duty.

11. At the time of his death the duty status of Vernon Shearer as reflected on Department of Defense form 1300, Report of Casualty, was "Active: authorized absence".

12. On Saturday, June 2, 1979, Private Vernon Shearer was kidnapped at point of gun and was shot to death by Private Andrew Heard (hereafter "Heard"), an active Army service member, in Otero County, New Mexico, approximately 5 miles north of the New Mexico—Texas state line.

13. On August 18, 1975, Andrew Heard, S.S. #496-48-4369, then 28 years of age, born October 7, 1946, had enlisted in the United States Army for a period of 3 years.

14. On January 6, 1976, Private Andrew Heard was transferred by the United States Army from Continental United States to EURA-Germany assigned to the 3rd Armored Division.

15. On August 28, 1976, Private Andrew Heard was arrested for the murder of a German female national committed on August 26, 1976, off the military reservation.

16. The Bill of Indictment presented against Heard by the Regional Court, Chamber of the Criminal Court, HANAU, Germany, stated in part:

> The accused inflicted serious head injuries on the 38-year-old Margarete Hess on the occasion of sexual actions by means of a wrench and a lifting jack and he choked her. Above all he caused serious internal injuries by brutal force especially in the thorax sphere. The injuries caused immediate death.
>
> * * * * * *
>
> The accused showered his victim with blows using a wrench and a lifting jack. He caused her serious head injuries in the sphere of the temples, by which he destroyed the skullcap. Judging from the skin injuries the victim must have received at least two blows. There was also found an injury of the right ear. Furthermore, the accused inflicted serious injuries on the victim in the sphere of the face skull. There were found chip fractures of the upper jaw on the right and on the left side, a fracture right in the middle of the lower jaw and more on the right side. There were skin defects all over the head, the neck, and the throat, which are to be attributed partly to the blows and partly to the choking. The dead body also showed serious injuries in the thorax sphere. Three ribs on the left side were broken. The breastbone had a fracture right across; the organs lying below showed serious injuries. Two veins of the heart were ruptured. The muscles of the right ventricle of the heart were injured. There were longitudinal fissures in the mucous membrane; and there were also two fissures on the combined cranial and arm artery on the right side. These injuries in the thorax sphere were caused by brutal force.

17. Private Heard was originally tried by State District Court (Landgericht) in Hanau on 10 June 1977, convicted of manslaughter (Section 212 of German Criminal Code) and sentenced to nine years adult confinement unsuspended.

18. The Federal Supreme Court (Bundesgerichtshof) ordered a retrial *in toto* on December 2, 1977.

19. Private Heard was found guilty of a less serious form of manslaughter under Section 213 of the German Criminal Code.

20. Private Heard was sentenced to four years confinement, unsuspended.

21. Private Andrew Heard was confined to a U.S. Confinement Facility in Germany between August 27, 1976 and July 17, 1978 and released February 3, 1979, after having served a portion of a 4 year sentence for manslaughter.

22. On February 3, 1979, Private Andrew Heard was transferred from Germany to the Continental United States.

23. On March 5, 1979, Private Andrew Heard was assigned to Headquarters Command, Ft. Bliss, Texas.

24. As early as on or about December 7, 1978, more than 5½ months before Vernon Shearer was murdered, his Battalion Commander in Germany, LTC Rayburn C. Storvall had recommended that Heard be eliminated from the serv-

ice under Chapter 14, Army Regulation 635-200, declaring: "Private Heard is unsuitable for military service as his record discloses."

25. Said recommendation was concurred in by Heard's Division Commander, Col. Donald E. Eckelbarger, on December 7, 1978, who wrote:

> "Recommend approval for Discharge UP Chapter 14, AR 635-200. Reasons for recommending approval: In view of the seriousness of the offenses committed Discharge UP Chapter 14, AR 635-200 would be in the best interest of Private Heard and the United States Army."

26. Said recommendation was concurred in by Brigadier General Charles E. Canedy, United States Army, Acting Commander, 3rd Armored Division, Germany, on December 7, 1978, who wrote:

> "Due to the serious nature of the offense for which he was convicted, elimination action from the service with issuance of an Under Other Than Honorable Discharge Certificate is deemed appropriate."

27. By letter of endorsement dated December 7, 1978, the Commander of Ft. Bliss was directed by the Chief, Appeals Branch, Department of the Army Military Personnel Center, Alexandria, Virginia, to proceed with elimination proceedings against Heard under the provisions of Chapter 14, AR 635-2000, and to return the case with his recommendation for final determination.

28. A mental status evaluation, incident to discharge under AR 635-200, Chapter 14, was not performed on Heard until June 11, 1979, after Heard had murdered Vernon Shearer.

29. Not until June 21, 1979, after Vernon Shearer's murder, did the Staff Judge Advocate of Ft. Bliss recommend approval of request that a board of officers be convened to allow Heard to show cause why he should not be eliminated from the service under Chapter 14, Army Regulation 635-200.

30. Not until July 13, 1979, after Vernon Shearer's murder, did United States Army officials even notify Heard of

its intentions to eliminate him from active duty under the provisions of AR 635-200.

31. On June 11, 1979, due to gunshot wound to the neck, Private Vernon Shearer was pronounced dead in Otero County, New Mexico, by a representative of the office of the Medical Investigator, Alburquerque, New Mexico.

32. Heard was arrested and jailed for the first degree murder of Vernon Shearer on 11 June 1979. He was extradited to Otero County, Alamogordo, New Mexico where he remained in custody pending disposition of charges.

33. On June 11, 1979, a Criminal Complaint, No. 170773 issued against Andrew Heard by the State of New Mexico charging him with the murder of Vernon Shearer.

34. On August 20, 1979, Heard pleaded nolo contendere to the crime of Second Degree Murder with Firearm Enhancement.

35. On August 24, 1979, for the murder of Vernon Shearer, Heard was sentenced by New Mexico District Court Judge Robert M. Doughty, II, to be imprisoned in the Penitentiary of New Mexico for the term of not less than 15 nor more than 55 years with credit for time served from the date of his incarceration on June 11, 1979.

36. An Army Elimination Board was convened on August 14, 1979. A Board of officers recommended that Private Heard be eliminated from military service for reason of misconduct because of civil conviction, for which he received a 4-year sentence of confinement, and furnished an under other than honorable conditions discharge certificate.

37. Private Andrew Heard was separated from the United States Army Under Other Than Honorable Conditions on October 29, 1979, in absentia.

38. Private Andrew Heard was separated from the United States Army under separation authority, paragraph 14-12a, Army Regulation 635-300, for misconduct—conviction by civil court, in absentia, on that date.

39. At the time of his kidnapping and the murder of Vernon Shearer, Heard had previously been known to have killed another individual, and had been convicted of that homicide, and was known by the United States Army to be dangerous and of a murderous disposition. Nevertheless he

was permitted to remain at liberty and free of any restraints, supervision, constraints or control.

40. The United States Government, acting through its Department of the Army, and its duly authorized agents, servants and employees, negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other person, in spite of the defendant's knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.

41. The United States Government, acting through its Department of the Army, and its duly authorized agents, servants and employees, negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including plaintiff's decedent, none of whom were warned of the dangers posed.

42. Solely as a result of the aforesaid, plaintiff brings this action under the Wrongful Death Acts of Pennsylvania and all other applicable jurisdictions, and under the Survivor Act of Pennsylvania, where Vernon Shearer was domiciled, and seeks such other damages as may legally be recovered as a result of or arising from the death of Vernon Shearer.

WHEREFORE, Plaintiff demands judgment against the defendant in an amount in excess of Fifty Thousand ($50,000.00) Dollars plus costs.

/s/ _____

WILLIAM T. CANNON, ESQUIRE
Attorney for Louise Shearer, Ind., and as Administratrix of the ESTATE OF VERNON SHEARER, deceased

DECLARATION

In accordance with 28 U.S.C. 1746, the following unsworn statement is made pertaining to the suit of *Louise Shearer* v. *The United States of America*, Civil Action No. 82-0082.

Vernon Shearer was on active duty in the United States Army at the time of his death and his surviving dependents, if any, are fully entitled to all statutory Veterans Administration Benefits. In addition, Vernon Shearer carried Serviceman's Group Life Insurance for the maximum amount of $20,000, an entitlement due solely to his status as a service member.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28th day of April 1982, United States of America.

/s/ _____

BRUCE E. KASOLD
Captain, JAGC

Supreme Court of the United States

No. 84-194

UNITED STATES, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ORDER ALLOWING CERTIORARI. Filed *October 29, 1984*.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Third Circuit* is granted.